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February 11, 2005

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: OSC File Nos. HA-04-3023 to 3025

Dear Representative Conyers:

The Office of Special Counsel (OSC) has finished its inquiry into information you provided about a possible violation of the Hatch Act. That information indicated that on April 20, 2004, three U.S. Department of Agriculture (USDA) officials made a presentation to the annual conference of the American Dairy Products Institute and American Butter Institute. The three officials were Dr. Larry Salathe, William March, and Dr. William Madison. You were concerned that these officials had apparently spoken in their official capacity as federal employees and had discussed ways to influence the upcoming election while on duty. You indicated that if so, the officials appeared to have violated the Hatch Act. The results of our inquiry are discussed below.

The Hatch Act (5 U.S.C. §§ 7321-7326) generally permits most federal employees to participate actively in partisan political management and partisan political campaigns. However, covered employees are prohibited from using their official authority or influence to interfere with or affect an election result. 5 U.S.C. § 7323(a)(1). Covered employees are also prohibited from engaging in political activity while on duty. 5 U.S.C. § 7324(a)(1). Political activity is activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group. 5 C.F.R. § 734.101.

Did Dr. Salathe engage in political activity?

Our inquiry found that though Mr. March and Dr. Madison were present during the presentation, Dr. Salathe gave the entire talk. During that talk, he used 16 slides. Several slides suggested that among other topics, Dr. Salathe discussed partisan political matters. For instance, the second slide was titled "USDA Goals and Objectives." It said, "Goals and Objectives in an election year: Maximize votes from major dairy States: California, Wisconsin, Minnesota, New York, Michigan" [punctuation changed]. The slide also showed a cartoon of a boxing donkey and elephant.

However, political activity for Hatch Act purposes is not activity that simply discusses the success or failure of a political party, partisan candidate, or partisan political group. Instead, it is activity directed toward that success or failure. 5 C.F.R. §

734.101. Our inquiry included interviews with a number of witnesses, and review of various documents including Dr. Salathe's own notes for his talk. All this evidence indicated that Dr. Salathe was not engaged in activity directed toward the success of a political party, partisan candidate, or partisan political group. That is, his talk was not aimed at helping President Bush or the Republican Party get elected. The talk did not suggest that President Bush or Republican dairy policies were better than Democratic candidates or policies. It did not suggest that audience members should vote for President Bush or Republican policies. It did not suggest that audience members should persuade others to vote for Bush or those policies. Instead, the talk described, in fairly neutral terms, what Dr. Salathe thought those policies were.

Various other points support the conclusion that Dr. Salathe was not engaged in activity directed toward President Bush's or the Republican Party's success in the upcoming election. For instance, all witnesses strongly denied that Dr. Salathe was engaged in such activity. Further, no witnesses had ever received any comments from other audience members suggesting that they considered Dr. Salathe's speech to be political. In addition, the evidence suggests that Dr. Salathe received no input from higher USDA officials telling him what his presentation should discuss.

Did Mr. March or Dr. Madison engage in political activity?

Our inquiry indicated that Mr. March and Dr. Madison participated in Dr. Salathe's presentation in only three ways. First, both men appeared as nonspeaking panelists while Dr. Salathe gave his talk. Second, both supplied technical data that Dr. Salathe used in his presentation. Third, Dr. Madison reviewed Dr. Salathe's 16 slides after they were prepared. However, evidence indicated that he did not review the slides for broad issues such as what general matters Dr. Salathe should discuss. Instead, Dr. Madison conducted only a narrow technical review of the slides concerning matters within his area of expertise, such as Milk Income Loss Contract (MILC) payments. The evidence therefore indicates that neither Mr. March's nor Dr. Madison's activities were directed toward President Bush's or the Republican Party's success in the upcoming election. We conclude that neither man engaged in political activity for Hatch Act purposes.

Did the three officials misuse their official authority?

An employee may not use his official authority or influence to interfere with or affect an election result. 5 U.S.C. § 7323(a)(1). Dr. Salathe, Mr. March, and Dr. Madison did this if they used their official titles while participating in political activity. 5 C.F.R. § 734.302(b)(1). However, we could not substantiate that the three officials participated in such activity, as discussed above. We therefore could not show that they misused their official authority or influence in this way.

The three officials might also have misused their official authority or influence if they used that authority to coerce anyone into participating in political activity. 5 C.F.R.

§ 734.302(b)(1). The U.S. Civil Service Commission has held that a situation where an employee "might feel it would be indiscreet not to comply" constituted coercion. In re Gunn, 2 P.A.R. 611, 613 (1959). However, our inquiry indicated that Dr. Salathe's speech had not coerced any audience members into voting for President Bush, the Republican Party, or the Republican administration's dairy program. We also found no evidence that any audience members would have felt it indiscreet not to vote for President Bush, his party, or his dairy program.

Did the three officials engage in political activity while on duty?

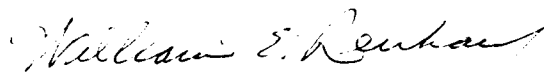
An employee may not participate in political activity while on duty. 5 U.S.C. § 7324(a)(1). However, we could not establish that the three officials engaged in political activity for Hatch Act purposes, and so could not show that they participated in such activity while on duty.

If we prosecuted this case before the Merit Systems Protection Board, we would have the burden of showing by preponderant evidence that the three officials used their official authority or influence to affect election results, or engaged in political activity while on duty. Given the discussion in the preceding paragraphs, we would be unable to meet that burden. Since we would be unable to show that the Hatch Act was violated, we are closing our file in this matter.

Though our inquiry indicated that Dr. Salathe did not engage in partisan political activity as defined under the Hatch Act, some reasonable people might have perceived that he did. This is particularly true of individuals who viewed his slides without also hearing his talk. We have therefore told Dr. Salathe that his presentation could reasonably have been perceived as involving political activity violating the Hatch Act. We have warned him to be careful to avoid this perception in future presentations. Otherwise, those presentations might be found to violate the Act.

For your information, I have enclosed our booklet *Political Activity and the Federal Employee*. Please call Ms. Ana Galindo-Marrone at (800) 854-2824 if you have any questions.

Sincerely,



William E. Reukauf
Associate Special Counsel
for Investigation and Prosecution

Enclosure